United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1939

512

No. 7470

SPECIAL CALENDAR.

FRED W. CARL, ALSO KNOWN AS BRENT W. CARL,
APPELLANT,

vs.

GRACE E. NORRIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED JULY 12, 1939

PRINTED AUGUST 22, 1939

United States Court of Appeals for the District of Columbia

APRIL TERM, 1939.

No. 7470

FRED W. CARL, ALSO KNOWN AS BRENT W. CARL, APPELLANT,

vs.

GRACE E. NORRIS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia

Civil Action No. 2301.

GRACE E. NORRIS, *Plaintiff*,

vs.

FRED W. CARL, also known as BRENT W. CARL, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Complaint*

(Wrongful Injury of Person by Automobile)

Filed April 4 1939

District Court of the United States for the District of Columbia

Civil Action No. 2301.

GRACE E. NORRIS, 1322 - 28th Street, S. E., Washington, D. C., *Plaintiff*,

vs.

FRED W. CARL, also known as BRENT W. CARL, 34th Service Co.—Engineers, Fort George G. Mead, State of Maryland, *Defendant*.

1. On January 5th, 1939, the plaintiff was a passenger and operator of an automobile which was being driven in a southerly direction on the Washington-Baltimore Boulevard, in the direction of the City of Washington, at or near

the Town of Jessups, Anne Arundel County, State of Maryland.

2. On the day and year aforesaid, the defendant, Fred W. Carl, also known as Brent W. Carl, was operating a certain automobile in a northerly direction on the Washington-Baltimore Boulevard, in the direction of the City of Baltimore, at or near the Town of Jessups, Anne Arundel County, State of Maryland, and the said defendant did then and there, at or near the Town of Jessups, aforesaid, carelessly and negligently operate the said automobile, thereby causing it to run into and collide with the automobile which was being driven by the plaintiff.

3. Wherefore, and as a result whereof, the plaintiff, Grace E. Norris, sustained serious, painful and permanent injuries, in that she sustained multiple and extensive injuries, lacerations, contusions, and bruises of the face, head, abdomen and limbs; including severe concussion of the brain, a fracture of the nasal bone and avulsion of
2 part of the nasal bone and adjacent muscles, severe injuries to the teeth; all of which injuries have caused, and will permanently cause, great pain and suffering, mental anguish, dizziness, nausea and loss of memory; and the plaintiff was otherwise injured and the plaintiff suffered and will in the future continue to suffer from permanent disfiguration, consisting of a large "U" shaped scar on the bridge of nose and multiple scars around the area of the nose, eyes and forehead, and the plaintiff's nervous system has become and will permanently remain disordered and impaired, all of which has rendered the plaintiff unfit to attend her usual duties and occupations as a housewife; and the plaintiff was otherwise injured and the plaintiff suffered damage to her wearing apparel and accessories. And the plaintiff has expended and in the future will be compelled to expend great sums of money in securing medical and dental aid and treatment and x-rays in an effort to be cured of her many and extensive injuries sustained as aforesaid.

WHEREFORE, plaintiff demands judgment of the defendant in the sum of Twenty-Five Thousand Dollars ($25,000.00), besides costs.

MICHAEL J KEANE JR
Attorney for Plaintiff.

The plaintiff, Grace E. Norris, demands a trial by jury of all of the issues in the above-entitled cause.

MICHAEL J KEANE JR
Attorney for Plaintiff.

---

3 *Motion to Dismiss*

Filed April 25 1939

* * *

The defendant, appearing specially and for the purposes of this Motion to Dismiss only, moves the court as follows:

1. To dismiss the action or in lieu thereof to quash and vacate the attempted service of process upon him, and the return thereof, in the above-entitled cause, upon the following grounds:

First: The Defendant since November, 1931, has been a legal and actual resident and citizen of the State of Maryland, being in the military service of the United States, stationed at Fort Meade, Maryland and having come to the State of Maryland on that date from Fort Houston, State of Virginia.

Second: That on April 6, 1939, the defendant was citizen and resident of the State of Maryland, as aforesaid, living with his wife and having all of his property and affairs therein at Odenton, Maryland.

Third: The defendant is not now, and was not at the time of the filing of the Complaint in this cause, nor at the time of said attempted service of the summons therein, nor at the time of the alleged injuries to the plaintiff, a citizen and resident of the District of Columbia.

Fourth: The defendant at the time of the said attempted service of process upon him was within the bounds of the District of Columbia for a period of approximately three hours only by reason of, and in obedience to, official order of his Commanding Officer, performing his duties as Sergeant of a unit of the United States Army, and for no other purpose whatever; that he left said District under military order; that his presence within said District was

4 not at his request.

Fifth: That for the reasons hereinbefore stated, any attempt on the part of this court to render a judgment in personam against the defendant would be unconstitutional, and any judgment so rendered would be null and void, in that the same would violate the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Defendant's Affidavit and Statement of Points are attached and are to be read as a part hereof.

P. J. SEDGWICK
Attorney for the defendant,
Appearing specially for the
purposes of this Motion only.

Affidavit in Support of Motion

Filed April 25 1939

CITY OF BALTIMORE,
State of Maryland, ss:

FRED W. CARL, being first duly sworn on oath, deposes and says he is the defendant named in this proceeding; that he has personal knowledge of the facts stated in this Affidavit, which is made in support of motion for an order quashing service of process herein, as follows:

That he is a citizen of the United States and a lawful resident of the state of Maryland, legally and actually living at Odenton, Maryland; that he is in the military service of the Army of the United States, being and holding rank of Sergeant, in the Service Company, 34th Infantry, and is stationed at Fort Meade, State of Maryland; that on April 6, 1939, affiant occupied this status as a legal resident of the State of Maryland, as aforesaid; that on the
5 6th day of April, 1939, affiant's Commanding Officer (of the Regiment) issued an order for the Regiment to go to Washington, D. C., to be in the Army Day Parade; affiant did not request permission to go into the District of Columbia, but in obedience of the Order of his Commanding Officer and solely on account thereof, affiant was compelled to, and did accompany his Company and Regiment from the State of Maryland into the District of Co-

lumbia for the purposes of the military order only; that the assembly point at Washington was Fort Myer, State of Virginia, from which point affiant and his military detail went into Washington, arriving there about 12:45 o'clock, p. m., April 6, 1939, and our trucks were then and there parked, as ordered, on Constitution Avenue, near the Lincoln Memorial; as soon as affiant arrived there and parked the Army truck which he was operating a Deputy United States Marshal presented himself and served on your affiant the summonses issued in this case and the suit papers appended thereto; that said Deputy was accompanied by Attorney Michael J. Keane, Jr., whom I had previously met, at the time of the service of papers on your affiant; thereafter, about 3 o'clock, p. m., and immediately following the Parade, affiant and his Regiment, in obedience to military order, left the District of Columbia and returned directly to Fort Meade, arriving at the Fort about 5:15 o'clock, p. m.; that at all times entering, remaining in, and departing from the said District of Columbia, your affiant was on active military duty as Sergeant of his Company in the service of the United States Army, and neither on nor conducting any personal business or purpose whatever; that he would not have been in the District of Columbia at the time of the attempted service of process upon him, except for the military order issued by his commanding officer which your affiant could not avoid or disobey.

6 Affiant says further that on April 3, 1939, he received a letter by U. S. Mail, from Baltimore, Maryland, signed "Eddie", enclosing two tickets for the boxing matches at Turner's Arena, at Washington, D. C., on April 10, 1939; that your affiant did not know the sender and did not use the tickets; that on April 6, 1939, at the time of attempted service of process as above set forth, Attorney Michael J. Keane, Jr., stated to your affiant that the tickets were still good and that I could still use them.

Affiant further says that he has been involuntarily subjected to the jurisdiction, expenses and inconvenience of a strange and foreign jurisdiction, namely, the District of Columbia; that he has been and is a citizen of the State of Maryland; that the accident and collision made the subject-matter of this suit occurred in the State of Maryland; That the rights and liabilities of the parties thereto are

determined by the laws of the State of Maryland, which courts are entirely competent to adjudicate the rights of the parties hereto; that affiant should not be required to appear herein and defend this cause.

That where the law or military order requires any duty of the citizen it will protect him in the discharge of that duty.

F. W. CARL.

Subscribed and sworn to before me this 21st day of April, 1939.

ANDREW HODSDEN
Notary Public

(Seal)

---

7 *Affidavit of Plaintiff in Opposition to Motion to Dismiss*

Filed May 3 - 1939

* * *

UNITED STATES OF AMERICA,
District of Columbia, ss:

GRACE E. NORRIS, being first duly sworn on oath deposes and says that she is the plaintiff named in the above-entitled cause; that she has personal knowledge of the facts stated in this affidavit which is made in opposition to a motion to quash service of process:

That she was seriously and permanently injured in an automobile collision which occurred on January 5th, 1939, as is more fully described in the Complaint filed in the above-entitled cause; that she was brought into the District of Columbia by ambulance and admitted to Garfield Hospital within one-half hour after the accident; that she remained in said hospital for many weeks thereafter; that the only medical treatment she received, except first aid at the scene of the accident, was rendered by doctors residing in the District of Columbia; that during her incapacity she was treated by some four medical specialists all of whom reside in the District of Columbia; that all of the records of the hospital are accessible only in the District of Columbia and such records, as well as the testimony

of the medical men, can only be compelled by process of the courts of the District of Columbia.

Affiant further says that the only witnesses to the accident were the occupants of the colliding vehicles, and one pedestrian witness; that all four of the occupants of the vehicle in which plaintiff was riding are easily available for appearance in the courts of the District of Columbia, and the one pedestrian witness has indicated his willingness
8 to appear in the courts of the District of Columbia at any time upon request; that the only remaining witnesses to the accident who apparently do not desire to testify in the District of Columbia consist of the defendant and the person who was riding in defendant's vehicle at the time of the collision, namely, Eben R. Neal, 34 Service Company, Fort Meade, Maryland.

Affiant further says that if she is compelled to litigate the grievance set forth in the aforesaid Complaint in the State of Maryland, she will be required to do so in Annapolis, Maryland, a place more distant from the scene of the accident than the City of Washington; that if required so to do, she will be unable to compel attendance of the many doctors that have treated her and who are expected to furnish the most important testimony; and she will be unable to compel the production of the many hospital records aforesaid; that all of the witnesses to the accident are more easily accessible in the courts of the District of Columbia than would be in Annapolis, Maryland; that all but one of the occupants of the vehicle in which plaintiff was riding at the time of the collision now reside in the District of Columbia, and the remaining one makes weekly trips to the District of Columbia.

Affiant further says that at the request of the Government Employees' Insurance Company, a firm having its principal and only office in the District of Columbia and who apparently carries the insurance coverage for the defendant, she submitted to a medical examination by a doctor employed by said insurance company and that this said doctor is likewise a resident of the District of Columbia; that all negotiations for the settlement of plaintiff's claim have been in the District of Columbia and she has made trips to the insurance company's office at the request of said insurance company to discuss her claim and at all

9 times has attempted to cooperate with said insurance carrier.

GRACE E. NORRIS

Subscribed and sworn to before me this 28th day of April, A. D. 1939.

ROBERT J KELLEY
Notary Public,
(Seal) *District of Columbia.*

My Commission Expires Nov. 1, 1943.

Affidavit of Michael J. Keane, Jr. in Opposition to Motion to Dismiss

Filed May 3 - 1939

* * *

UNITED STATES OF AMERICA,
District of Columbia, ss:

MICHAEL J. KEANE, JR., being first duly sworn according to law, on oath deposes and says that he is the attorney for the plaintiff in the above-entitled cause; that he has personal knowledge of the facts stated in this affidavit which is made in opposition to a motion to quash service of process:

That all negotiations for the settlement of the claim arising out of the plaintiff's injuries received on January 5th, 1939, and fully described in the Complaint filed in the above-entitled cause, were had in the District of Columbia, and said negotiations extended over a period of many months; that said negotiations consisted of numerous conferences with officials of Nichols Company, insurance adjusters, and the Government Employees' Insurance Company, insurance carrier, both of which firms have their only offices in the District of Columbia; that at no
10 time did said companies consider the transaction as anything other than a local matter.

That after many months of negotiation with said companies and after full disclosure of the plaintiff's case and all of plaintiff's evidence, including voluntary medical examinations, the said companies advised affiant that they did

not desire to settle the claim on any basis; that at that time said insurance carrier did not deny liability of its insured, but merely told affiant to "try and get service"; that this statement was made to affiant by a Mr. Weiss, official of the said Government Employees' Insurance Company; that the said Mr. Weiss also stated, in response to affiant's mention of the inability to get the witnesses to appear in the State of Maryland, that "that's too bad, and your worry"; affiant further states that Mr. Weiss refused to allow the defendant, Fred W. Carl, to come into the District of Columbia for acceptance of service, although affiant is of the opinion that defendant would have under the circumstances, and the said Mr. Weiss advised the affiant that if Mr. Carl did come in the District of Columbia, the insurance company would "deny liability on the policy".

Affiant further says that it was because of the aforegoing attitude of the insurance carrier that affiant was compelled to resort to the methods related in defendant's affidavit filed herein, and because of a desire on the part of the affiant to protect the rights of the defendant under his policy of insurance and to keep intact plaintiff's indirect interest therein.

Affiant further says that when service was finally made upon defendant, the affiant was in company with a United States Marshal, who first asked permission of a commanding officer to effect service upon the defendant, and that affiant and said United States Marshal were given a motorcycle escort to the place where defendant was stationed; that defendant made no objection to said service and on the contrary made several inquiries as to the present condition of the persons injured in the accident; that defendant said at the time "What should I do with these papers—file them with the insurance company?"

11

Affiant further states that on the day on which defendant came into the District of Columbia, he was suffering from a sore leg, and for that reason was not marching, but riding in a motor-truck; that defendant did not have to attend the parade in the District of Columbia unless he so desired, on account of said disability.

MICHAEL J KEANE Jr

Subscribed and sworn to before me this 27th day of April, A. D. 1939.

RUBY J. PETERSON
Notary Public, D. C.

(Seal)

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12 *Order Overruling Motion to Dismiss*

Filed June 24 1939

* * *

Upon consideration of the defendant's Motion to Dismiss or in lieu thereof to quash service of process herein, oral argument by counsel in open court being had, it is, by the Court, this 23rd day of June, 1939,

ORDERED, that the Motion be, and it hereby is, overruled, as of May 18, 1939.

JOSEPH W COX
Justice

O K as to form.
M J KEANE Jr
Atty for Pltff.

Order Allowing Special Appeal

Filed June 22 1939

United States Court of Appeals for the
District of Columbia

No. 3105 Original. April Term, 1939.

Civil Action No. 2301.

FRED W. CARL, *Petitioner,*

vs.

GRACE E. NORRIS.

On consideration of the petition for allowance of a special appeal from the order of the District Court of the United States for the District of Columbia entered therein on May 18, 1939, by Mr. Justice Joseph W. Cox,

It is ordered by the Court that the petition be, and it is hereby, granted and a special appeal allowed as prayed.

Per MR. CHIEF JUSTICE GRONER,
June 19, 1939.

A true Copy,
Test: JOSEPH W. STEWART
Clerk, of the United States Court of Appeals
(Seal) *for the District of Columbia*

13 *Designation of Record*

Filed June 26 1939

Civil Action Nos. 2300 and 2301.

* * *

The defendant having perfected an appeal herein to the United States court of Appeals for the District of Columbia, appearing specially and for no other purpose, hereby requests the Clerk of the District Court to prepare, at defendant's expense, a transcript of the record on appeal, including therein the following papers and proceedings, namely:

1. All of the pleadings and affidavits filed in the case, being

Plaintiff's Complaint
Defendant's Motion to Dismiss
Defendant's Affidavit in support of Motion to Dismiss
Defendant's Statement of Points and Authorities
Plaintiff's Affidavits in opposition to Motion to Dismiss
Order of Justice Cox Overruling Motion to Dismiss
Order of Court of Appeals allowing Special Appeal

2. Together with a copy of this designation.

P. J. SEDGWICK
Atty. for Defendant, Appearing Specially for the purposes of the Motion to Dismiss and Special Appeal only.

Dated: June 26, 1939.
Copy received,
MICHAEL J KEANE Jr
Attorney for Plaintiff.

14 District Court of the United States for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 2301 Civil Action, wherein Grace E. Norris is Plaintiff and Fred W. Carl, also known as Brent W. Carl, is Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of July, 1939.

C. E. STEWART,
(Seal) *Clerk.*

Endorsed on Cover: No. 7470 Special Calendar Fred W. Carl, also known &c., Appellant, vs. Grace E. Norris. United States Court of Appeals for the District of Columbia Filed Jul 12 1939 Joseph W. Stewart Clerk

FILED SEP 20 1939

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1939.

No. 7470.

SPECIAL CALENDAR

FRED W. CARL, *Appellant,*

v.

GRACE NORRIS, *Appellee.*

BRIEF FOR APPELLANT.

PAUL J. SEDGWICK,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1939.

No. 7470.

SPECIAL CALENDAR

FRED W. CARL, *Appellant,*

v.

GRACE NORRIS, *Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is a special appeal from an order of the United States District Court for the District of Columbia overruling a Motion filed by the appellant to Dismiss the Complaint for Negligence filed by the appellee, or in lieu thereof to Quash the Service of Process upon the appellant.

The pleadings disclose that on January 5, 1939, an automobile accident occurred on U. S. Route No. 1 between Baltimore and Laurel, State of Maryland, involving two cars. The appellant was the driver of

one of the vehicles and the appellee was the operator of the other. The appellee was injured. On April 4, 1939, the appellee (plaintiff below) filed suit against the appellant and on April 6, 1939, a Deputy U. S. Marshal handed the summons and suit papers to the appellant. At the time thereof, the appellee was a legal resident of the District of Columbia and the appellant was a legal resident of the State of Maryland, temporarily within the District of Columbia by virtue of Military Order and Presidential Edict fixing April 6th as "Army Day" and requiring the Fort Meade (Maryland) and Fort Myer (Virginia) United States Army Corps to parade in the Capital City.

The appellant, at the time of attempted service of process upon him, was a citizen of the United States, a legal and actual resident of the State of Maryland, and an active officer of the United States Army; his rank was that of Sergeant in the Service Company, 34th Infantry, United States Army, stationed at Fort Meade, State of Maryland. The appellant is married and maintains his home and family at Odenton, State of Maryland; his automobile which was involved in the accident referred to was, and is, duly licensed by the State of Maryland, and that State issued its Driver's Permit to the Appellant.

In obedience to the Presidential Edict and Military Order of his Commanding Officer, the appellant and his Company, on April 6th, 1939, left Fort Meade, Maryland, and journeyed to Fort Myer, Va., where other service units were joined. At 12:45 o'clock, p. m., the appellant's Company arrived in the District of Columbia and participated in the Army Day Parade. At about 3 o'clock, p. m., his Company left said District and returned directly to Fort Meade, Maryland. How-

ever, during the Parade and somewhere along the line of march on Constitution Avenue, service of process was effected, and it is this service that was questioned by the appellant's Motion to Dismiss or in Lieu thereof to Quash Service of Process and is involved in this Special Appeal. Said Motion was supported by affidavit and all pleadings were filed under a Special Appearance.

ASSIGNMENT OF ERRORS.

1. The Court erred in not dismissing the Complaint for Negligence on motion of the defendant below.

2. The Court erred in not quashing the service of process upon the defendant.

SUMMARY OF ARGUMENT.

The appellant in this case respectfully submits that he is entitled to have the matter of his liability, if any, for the collision complained of, decided in Maryland. The Courts of Maryland can and will do full justice to all parties concerned. This accident occurred in Maryland; the cause of action arose in Maryland; Maryland law governs the case; witnesses and evidence reside in Maryland; official records and documentary evidence are there; the appellant is a citizen and resident of Maryland; police officers handling the case are in that State; official reports, including statements and admissions of drivers and witnesses alike, are in Maryland; appellant's evidence concerning Military Orders and the like are at Fort Meade, Maryland; even one of the appellee's witnesses resides in Maryland. These and other reasons cry out against the maintenance of this suit in this District; that Maryland is the

proper jurisdiction. It cannot be, and it is not, disputed that the appellant came into the District of Columbia for only 3½ hours with his military unit, in obedience to the command of his superior officers, to participate in the Army Day Parade.

THE LAW AND THE ARGUMENT.

In Ruling Case Law, Volume 21, Paragraph 49, under the heading of Process, Exemption, Persons in the Military Service, the rule is stated to be that

> "Persons engaged in the Military Service, whether in the State Militia or in the regular Army, *are exempt* from the service of civil process when in actual service or when going to or returning from any muster or state encampment." (Citing Breitenbach vs. Bush, 44 Pa. St., 313; 84 Am. Dec., 442)

Under the same heading, Corpus Juris in Volume 50, page 558, states that

> "By virtue of statutory provisions, exemption from service of civil process has been frequently extended to persons engaged in the military service of the state or of the United States," and the following cases are cited:
>
> "Greening vs. Sheffield, 1 Minor (Ala.) 276.
> Davidson vs. Barclay, 63 Pa. 406.
> Drexel vs. Miller, 49 Pa. 246.
> Daron vs. Prudential Insurance Company, 26 Pa. Dist. 691.
> Land Title etc. Co. vs. Crump, 16 Pa. Co. 593.
> Rank vs. Wenger, 1 Pearson (Pa.), 532.
> Heck vs. Fink, 1 Woodw. (Pa.) 102.
> Gregg vs. Summers, 12 S. C. L. 461.
> Hickman vs. Armstrong, 4 S. C. L. 176.
> Kirkpatrick vs. Irby, 14 S. C. L. 205."

> "and even in the absence of such a statute it has been held that public policy demands the recognition of such exemption." (Citing Land Title etc., Co. vs. Rambo, 174 Pa. 566)

In the case of *Greening* v. *Sheffield,* 1 Minor (Ala.), 276, just referred to, the Plea filed therein asserted that "The Writ was executed on the defendant while he was returning from a battalion muster, to which he had been for "the purpose of performing militia duty." An affidavit supported the Plea. In the lower court the demurrer to the Plea was sustained, but the appellate court in reversing the lower court ruling, stated,

> "Service of a writ of capias on the defendant while returning from a militia muster is void."

American State Reports, Volume 76, page 535, has this to say:

> "Persons engaged in the military service, whether in the state militia or in the regular army, *are exempt* from the service of civil process when in actual service or when going to or returning from any muster or state encampment."

In the case of *Williams* v. *McGrade,* 13 Minn. 174, the exemption was recognized, but it was held to have been waived by the defendant because of his failure to appear specially and in due time.

At the time of argument upon the Motion in the District Court, in the present case, counsel for appellee cited the case of *Murrey* v. *Murrey,* 216 Cal. 707. However, that case is to be distinguished, as follows:

1. The defendant Murrey was not in the regular Army service; he was a civilian and privately employed, although he had a reserve status.

2. At the time he was served with process he was engaged in a two weeks period of reserve duty, following which he resumed his civilian work and status.

3. He was *not* commanded or ordered to leave Utah (his state of residence) and go into California (state in which he was served) with any military company or unit under orders; instead

4. Murrey desired to go to California for personal reasons; he preferred to perform his reserve duty in California rather than in his own state; he filed *written application* expressing his desire to go into California; superior officers did *not order* him to go into California. Murrey's express application was granted and his entry into California was entirely voluntary and not in obedience to any command or order.

5. A certified copy of Murrey's Application showing his voluntary entry into California was introduced in evidence against his claim of exemption, and this writing showed on its face that Murrey was not in California by reason of any military command or order.

6. Finally, as the Court in that case stated, public policy was the ground upon which courts in reported cases had quashed service of process upon members of the Army who had been compelled by command of superior officers to go beyond the bounds of their own state. In the Murrey case, it was also a matter of public policy that fathers should provide for their minor children and prevent them from becoming public charges or objects of charity. And that, as between the two interests of the public, there was no reason to apply the exemption in favor of Murrey who had gone into California voluntarily. The inference is strong that had Murrey been ordered into California the exemption would have been allowed.

In the case of *Northwestern Casualty & Surety Company* v. *Conway,* 230 N. W. 548 (Iowa), the court said,

> "Immunity from process, when accorded to persons engaged in the military service, is based upon grounds of public policy."

Perhaps, the leading case on point is that of *Land Title & Trust Company* v. *Rambo etc.,* 174 Penna. 568; 34 Atl. 207, wherein the question of extending exemption to members of the military unit is fully discussed, as follows:

> "The Commander in Chief of the National Guard, the Governor of the Commonwealth, ordered the encampment of the regiment to which Captain Crump's Company belonged. He was bound to obey or be subject to court martial for disobedience. He did obey, while returning from the encampment he was bound to attend he is served with a summons beyond the borders of the county which he is a resident. * * * The members of the organization are bound to obey the order of their Commander in Chief, the Governor, they have no option Is it not clear, that if service of summons in the civil suit is good on a member of the guard in any county between Philadelphia and Erie, the efficiency of the organization will be impaired; men will be deterred from entering it; or be impelled to disobey the command of the Governor. The non-military debtor can remain within the jurisdiction of the courts of the county where he is resident, the creditor must there bring suit against him and obtain service, but if a debtor be a member of the National Guard, suit can be brought against him in any county of the Commonwealth which military obedience requires him to pass through. He may be dragged hundreds of miles with his witnesses to a distant county to make defense against a claim

"We think to so hold would be in direct conflict with public policy; with the declared policy of the Commonwealth. In the organization of the National Guard, we have no notion of holding that membership therein exempts from the ordinary duties and liability of the citizen. The military power is subject to the civil, when not in the act of obedience to the order of the Commander in Chief at, going to, or returning from an encampment, all its members are subject to arrest or service of summons as other citizens, but we think public policy, from the very necessity of the case, dictates exemption from service of summons when in the act of obeying the command of the Governor to go into encampment in another county.

"Judgment of the court below is reversed, and summons to defendant set aside at costs of appellee."

District of Columbia Code Sections bearing on the question here presented are as follows: Sections Nos. 1484, 1485, 1491, and 1492.

When the parade was over, still under military command, this appellant immediately returned to Maryland. It is believed that there must be some protection, some exemption, or some immunity for a citizen of another state who involuntarily and in obedience to military command comes into the District of Columbia and is served with process under the factual situation here presented.

IN CONCLUSION.

It is resepctfully submitted that the order of the District Court in this cause was in error and its decision should be reversed, and that an order be entered granting the appellant's Motion to Dismiss the Complaint or in lieu thereof to Quash the service of process therein, with costs in this behalf incurred.

Respectfully submitted,

PAUL J. SEDGWICK,
Attorney for Appellant.

DISTRICT OF COLUMBIA
FILED OCT 13 1939
Joseph W. Stewart
CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1939.

No. 7470.

SPECIAL CALENDAR.

FRED W. CARL, Also known as BRENT W. CARL,
Appellant,

v.

GRACE E. NORRIS, *Appellee.*

BRIEF FOR APPELLEE.

MICHAEL J. KEANE, JR.,
Woodward Building,
Attorney for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

This case is before this Court on a special appeal duly allowed (R. 10) upon the petition of the defendant below.

As appears from the statement of the case contained in the brief for appellant, the plaintiff below seeks to recover damages for personal injuries sustained by her as a result of an automobile collision which occurred on January 5th, 1939, on the Washington-Baltimore Boulevard, at or near the Town of Jessups, Anne

Arundel County, State of Maryland. The complaint alleges the negligence of the defendant below as the cause of the injuries sustained by the appellee. (R. 1-2)

The defendant below by motion to quash sought to set aside the service of process had upon him while he was temporarily in the District of Columbia, participating in the Army Day exercises as a member of the United States Army, 34th Infantry, Service Company, Fort Meade, Maryland. (R. 2-6)

On June 24th, 1939, the court below denied the motion to quash the service of process, holding the same to be valid and effective and refusing to recognize the immunity or exception from service of process asserted by the defendant as resulting from his military status. (R. 10) It is from the order overruling the motion to quash that the defendant below has procured an allowance of, and now prosecutes, a special appeal to this Court. (R. 10-11)

Aside from the statement of the case contained in appellant's brief, the following facts appear from the affidavits filed in the court below:—That the alleged collision occurred about fifteen (15) miles from the center of the City of Washington and immediately after the accident the appellee was placed in an ambulance and taken to Garfield Hospital, Washington, D. C., arriving there about 15 minutes thereafter; that appellee remained in the hospital many weeks, during which time she was treated by some four (4) medical specialists, all of whom reside in the District of Columbia, constituting indispensable witnesses not readily available through the processes of courts other than the local tribunals, as are the hospital records; that the witnesses to the accident numbered in all seven, consist-

ing of three friends riding in the car with the appellee, the appellee herself, the defendant below, and an occupant of his car, and a pedestrian witness, which latter witness has indicated his willingness to appear in the courts of the District of Columbia to testify; that the testimony and records constituting appellee's cause of action are subject to control only by processes of the local courts and, if plaintiff below is compelled to litigate in the State of Maryland the proceedings will have to take place at Annapolis, Maryland, a place more distant from the scene of the collision than the City of Washington, and if so compelled will be required to rely on the voluntary (and doubtful) attendance of witnesses in order to present even a prima facie case; that for many months after the accident the plaintiff below negotiated with appellant's insurance company, namely, the Government Employees' Insurance Company, a local insurance company and even submitted to medical examinations conducted by local practitioners for the benefit of, and at the request of, said insurance company (R. 6-7); that said insurance company refuses to litigate in any other jurisdiction solely on the grounds that it knows of the disabilities to be encountered by the plaintiff below in the courts of the State of Maryland (R. 9-10); that because of these reasons, it is in reality the insurance company that is asserting the alleged privilege and not the appellant (R. 9); that defendant below made no objection to said service at the time it was effected (R. 9); that when defendant below came into the District of Columbia on April 6th, 1939, he was suffering from an injured leg and for that reason was not compelled to attend, but came voluntarily for entertainment personal to himself (R. 9); that the service of

process was made upon defendant below only after permission was first obtained from the commanding officer and after receiving said permission the United States Marshal was given a motorcycle escort to the place where appellant was stationed (R. 9); that defendant below was not in the parade itself but riding in a motor truck which had brought in a group of the soldiers from Fort Meade and which at the time was parked and awaiting the conclusion of the parade so as to transport the men back to their quarters (R. 9).

II.

SUMMARY OF THE ARGUMENT.

1. Immunity from service of process is extraordinary and he who asserts it has the burden of establishing the special grant.

2. At common law immunity from service of civil process was limited to persons aiding the courts in the administration of justice. Beyond that field the common law recognized no other immunity.

3. The common law rule will not be extended by judicial decision.

4. If any such exemption or immunity from service of civil process exists today, it exists solely by statute.

5. The matter of the appellant's immunity from civil process is regulated by Title 10 U. S. C. Section 610 (R. S. 1237) and limited thereby.

6. An immunity, if any exists, is personal to the one to whom it is extended and cannot be delegated to another for the latter's pecuniary benefit.

7. Discussion and analysis of decisions relied upon by appellant.

III.

ARGUMENT.

1.

Immunity from service of process is extraordinary and he who asserts it has the burden of establishing the special grant.

In *Moses* v. *Mellett,* 3 Strobhart 210 (S. Car. L.) (1848), the court in considering the matter of a soldier's exemption from service of process in a civil proceeding, makes the following comment, viz:

> "The laws of the State and the jurisdiction of the superior Courts, operate on every citizen; and he who claims exemption from their force and authority must show the special grant of the privilege."

2.

At common law immunity from service of civil process was limited to persons aiding the courts in the administration of justice. Beyond that field the common law recognized no other immunity.

In *Murrey* v. *Murrey,* 216 Cal. 707; 16 Pac. (2) 741 (1932) (Certiorari Denied, 289 U. S. 740; 77 L. ed. 1487), the leading case on the subject of this appeal, the Court in considering the exemptions of a soldier in the United States Army, said:

> "Under the common law rule as developed in England, there is no doubt that the exemption here claimed did not exist. Under the early common law rule, the exemption extended only to parties to judicial proceedings and their witnesses, and members of the court, where duties required their attendance upon the court and whose pres-

ence was necessary to the court in the performance of its functions."

In *Land Title and Trust Co.* v. *Crump,* 16 Penna. Co. Ct. Rep. 593 (1895), discussing a soldier's exemption, said:

> "Exemption from the service of civil process was at common law a privilege extending only to those who were required to assist in the administration of justice, such as parties, witnesses, attorneys, jurors, etc. . . . Bacon's Abr. title 'Privilege' ".

To same effect, *Merrick et al.* v. *Giddings,* 1 Mac A & Mackey 55; 11 Sp. Ct. D. C. 55 (1879); *Howard* v. *The Citizens Bank,* 12 App. D. C. 222 (1898); *Lamb* v. *Schmidt,* 285 U. S. 222; 76 L. ed. 720 (1932); *Long* v. *Ansell,* 293 U. S. 76; 79 L. ed. 208 (1934).

3.

The common law rule will not be extended by judicial decision.

In *Berlet* v. *Weary,* 67 Neb. 75; 93 N. W. 238 (1903), the Court said:

> "If we were, by judicial legislation, to extend to senators and representatives that exemption from the service of summons which is enjoyed by parties and witnesses, we would be logically bound by the same reasons and arguments to extend it also to the executive branch . . . And if we extend the doctrine at all, why should we stop with state officers? Why do not the arguments made as to legislators apply with equal force to local executive officers, like sheriffs? . . ."
>
> "If the legislature deems it for the best interests of the state to exempt its members from the

> service of summons at the seat of government during its sessions, the remedy is entirely in its hands . . . For us to announce that rule in advance of such action . . . would, it seems to us, be little short of revolutionary."

In *Gratz* v. *Wilson,* 6 N. J. 419 (1798), the Court had under consideration the asserted privilege of a justice of the United States Supreme Court who was served with civil process while passing through the state en route to a circuit assignment in another state. In rejecting the asserted privilege, the court said:

> "Privilege is ever a matter stricti juris, and ought not, particularly one of so odious a character, to be extended by implication."
>
> "Arguments have been laid before us, drawn from general views of policy, public utility, and convenience; but these cannot serve as the foundation of an introduction, by the judiciary, of a new rule . . ."

In *Murrey* v. *Murrey, supra,* the court appropriately stated:

> "This exemption from service of process [as to witnesses] is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded."

Probably the soundest reason for the refusal of the courts to extend by judicial decision the privilege enjoyed by persons affiliated with the administration of justice to other fields, such as soldiers and legislators, is that while the courts are acquainted with their own

needs and requirements, they are not acquainted with the needs, requirements and wishes of these other departments. Therefore such matters are best left to the legislators. Even within their own field, the courts restrict the privilege whenever possible. *Lamb* v. *Schmidt,* 285 U. S. 222; 76 L. ed. 720 (1932), *supra.*

4.

If any such exemption or immunity from service of civil process exists today, it exists solely by statute.

In 5 Corpus Juris, "Army and Navy", Section 224, the following text matter appears:

> " . . . And it seems that there is no such exemption in any case except when secured by statute . . ."

In *Merrick et al.* v. *Giddings,* 1 Mac A & Mackey, 55; 11 Sp. Ct. D. C. 55; (1879), *supra,* the Court, considering the privilege of legislators, said:

> "The law-making power may confer an additional grant of privilege to the same parties, but in that case it could hardly be said with propriety that the second grant was included in the first. On the contrary the privilege was extended, because it had not been previously enjoyed."

In *Land Title and Trust Co.* v. *Crump, supra,* the Court said:

> "All other exemptions, such as of the clergy while performing divine services, of members of parliament, of peers, of soldiers, were regulated by statute."

See also *Ex Parte Harlan,* 39 Ala. 563 (1865).

5.

The matter of the appellant's immunity from civil process is regulated by Title 10 U. S. C. Section 610 (R. S. 1237) and limited thereby.

Title 10 U. S. C. Section 610 (R. S. 1237) provides as follows:

> "No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to $20.00. when first contracted."

As Congress by legislation has seen fit to regulate the extent of a soldier's exemption from civil process, it is not an unreasonable conclusion that the matter having been fully considered by Congress, the final draft of the legislation represents the extent to which that body feels the exemption should be extended. *Ex Parte Harlan,* 39 Ala. 563 (1865), *supra.*

That being so, we find that Congress has exempted the soldier from civil process only to the extent of "arrest" and says nothing whatsoever about any exemption from mere process of summons *ad respondendum.* Under such circumstances, it is clear that no exemption was intended by Congress and none will be inferred therefrom. In *Long* v. *Ansell,* 293 U. S. 76; 79 L. ed. 208 (1934) *supra,* the court states the rule of statutory construction as follows:

> "Senator Long contends that Article 1, Section 6, Clause 1 of the Constitution confers upon every member of Congress, while in attendance within the District, immunity in civil cases not only from arrest but also from service of process . . . Clause 1 defines the extent of the immunity. Its language

> is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant."

In *Merrick et al.* v. *Giddings,* 1 Mac A & Mackey 55; 11 Sp. Ct. D. C. 55 (1879), *supra,* cited with approval by the Supreme Court of the United States in *Long* v. *Ansell, ubi supra,* the court reiterates the rule:

> "It is a reasonable rule in the construction of all statutes that when a privilege is conferred its operation will be restricted by the terms of the grant . . ."

To same effect *Howard* v. *The Citizens Bank,* 12 App. D. C. 222 (1898), *supra.*

In *United States* v. *Kirby,* 7 Wall 482; 19 L. ed. 278 (1869), the court speaking of exemptions, states:

> " . . . But whether legislation of that character be constitutional or not, no intention to extend such exemptions should be attributed to Congress unless clearly manifested by its language."

In *Coxson* v. *Doland,* 2 Daly (N. Y. Com. Pleas Rep.) 66 (1866), the referring to alleged immunities of public officials, says:

> ". . . An intent on the part of the Legislature to do so will not be inferred, unless it is plainly and distinctly expressed . . ."

In *Wright* v. *Quinn,* 1 Yeates Rep. (Pa.) (1792), we find the court construing the very statute under discussion and holding that its terms does not exempt a soldier from mere service of process but only to the extent of arrest. See also in *The Matter of Roode,* 2 Wheeler's Cr. Cases (N. Y.) 541 (1814).

In *Land Title and Trust Co.* v. *Crump,* 16 Penna. Co. Ct. Rep. 593 (1895), *supra,* the court, in construing a similar statute, limited its operation to "arrest" on civil process, saying:

> "In England and in most, if not all of the states, excepting Pennsylvania, this privilege is restricted to freedom from arrest, and does not protect one from the service of a summons . . ."

In *Hart et al.* v. *Flynn's Executor,* 38 Kentucky (8 Dana) 190 (1839), a case cited with approval by the Supreme Couurt of the United States in *Long* v. *Ansell, supra,* it was specifically held that a soldier's exemption from arrest "on civil process" did not invalidate mere service of summons. The court said:

> "Arrest signifies a restraint of the person, a restriction of the right of locomotion, which cannot be implied in the mere notification or summons on petition, or any other service of such process, by which no bail is required nor restraint of personal liberty."

In 5 Corpus Juris, Army and Navy, Section 224, the following statement appears:

> "Moreover a statute which exempts officers and soldiers from arrest does not exempt them from the service of process where bail is not required."

That the statutes extending exemptions to members of the military are strictly construed is clear from the decision in *Kirkpatrick* v. *Irby,* 3 McCord's Rep. (S. Car.) 205 (1825), where the phrase "called into service" and "Discharged from service" was limited to actual service in time of warfare or insurrection, and not mere service at a reception for General Lafayette.

To same general effect, *White et al.* v. *Lowther et al.*, 3 Geo. 397 (1847); *Murphy* v. *McCombs*, 33 N. Car. 274 (1850). Nor will a statute similar to the one in question be construed as exempting a commissioned, as distinguished from a non-commissioned, officer. *Ex Parte Harlan*, 39 Ala. 563 (1865), *supra.*

There is no basic difference between the proposition raised by the appellant in the present appeal and the one raised in *Long* v. *Ansell, supra.* In the latter case the argument centered around the construction of a similar provision in the Constitution of the United States, while the present argument centers around the construction of a provision in an Act of Congress. It is submitted that the rule of construction should be the same in both instances. Therefore, the point in the present appeal is controlled by the ruling of the Supreme Court of the United States. Moreover, the Supreme Court, in the *Long* case relies heavily upon decisions involving soldiers' exemptions, namely, *Hart et al.* v. *Flynn's Executors, supra,* in reaching its conclusion.

6.

An immunity, if any exists, is personal to the one to whom it is extended and cannot be delegated to another for the latter's pecuniary benefit.

The uncontradicted facts contained in the affidavits in the court below disclose that the Government Employees Insurance Company is the insurance carrier for the appellant, and that any pecuniary loss resulting from a judgment entered against the appellant will fall upon that company and not upon the appellant. It also appears that all negotiations for settlement of the cause of action were carried on with the

insurance company and not with the appellant. It necessarily follows that the Government Employees Insurance is the one asserting the alleged privilege of the appellant, and, further, the appellant has permitted the said company to do so.

Realizing that an insurance company can defend in the name of its assured and that its liability is conditioned upon the ultimate liability of the assured, still, to permit the company to use and assert a privilege, solemnly given, if at all, to the assured, would amount to a base abuse of the grant extended, and, as such, deprive the recipient thereof of all its benefits.

Such a rule would not be an unjust or unfair one, for the reason that the privilege, if any, was extended for the benefit of the original donee and no one else. If the donee sees fit to delegate it to another for the latter's exploitation for pecuniary profit, he can no longer lay any claim to it, or insist upon its continued recognition.

Such a rule is more readily acknowledged as fair when one considers that the insurance company, here involved, is a local corporation subject to process at all times by the courts of the District of Columbia, screening itself behind a solemn privilege which, if existing at all, exists by virtue of a special grant and curtesy to another and different person.

7.

Discussion and analysis of decisions relied upon by appellant.

The Appellant relies almost solely on the case entitled *Land Title and Trust Company* v. *Rambo,* 174 Penna. St. Rep. 566; 34 Atl. 207 (1896) which it is conceded partially bears out his contention. However, a

careful reading of the case will disclose that even the liberal rule prevailing in the State of Pennsylvania is restricted to cases where the member of the military is going to or returning from "muster" or "encampment." At least the soldier must be participating is something more important in scope than a mere social function, such as an "Army Day Parade." The following language in the case would warrant such a conclusion:

> "We have no notion of holding that mere membership in the National Guard exempts from ordinary duties and liabilities of the citizens . . . when not in the act of obedience to the order of the commander-in-chief, at, going to, or returning from *an encampment,* all its members are subject to arrest or service of summons as other citizens . . . ." (Italics supplied)

This limited construction prevails in *White et al.* v. *Lowther,* 3 Geo. (Kelley) 397 (1847); *Kirkpatrick* v. *Irby,* 3 McCord (Sc) 205 (1825), *supra.*

In addition, it is submitted that the rule expressed, even as thus limited, represents the liberal policy existing only in Pennsylvania and disapproved by the Supreme Court of the United States in *Long* v. *Ansell, supra.* In this latter case see the courts treatment of *Bolton* v. *Martin,* 1 Dall. (U. S. Pa.) 296; 1 L. ed. 144; (1788) and other Pennsylvania decisions in this field.

Then again the *Rambo* case was relied upon in the recent *Murrey* v. *Murrey, supra,* decision and the Court refused to follow its reasoning. The denial of certiorari in *Murrey* v. *Murrey* would seem to indicate that Supreme Court was adhering to its previous position in refusing to recognize the liberal Pennsylvania rule.

The soundness of the lower court decision in the *Rambo* case, *sub nomine, Land Title and Trust Co.* v. *Crump,* 16 Penna. Co. Ct. Rep. 593, *supra,* although reversed by the appellate tribunal, cannot be questioned in the light of the decisions of the Supreme Court of the United States, and those in the great majority of the states.

The appellant also relies on *Greening* v. *Sheffield,* 1 Minor (Ala.) 276 (1824), but this case, unfortunately for the appellant, has been qualified by *Ex Parte Harlan,* 39 Ala. 563 (1865), *supra.* Then again, a statute was the controlling feature of the case.

The remaining decisions relied upon in appellant's brief are not in point, for the reason that all are based upon statutory provisions.

If we were to follow the rule sought by the appellant a frightful condition would result in the District of Columbia. For the reason that the many thousands of soldiers stationed in the capital of the nation under military orders either at the War Department, Walter Reed Hospital or elsewhere in the city, would be immune from process, even for obligations created while residing here. In all probability counsel for the appellant desires to deny the privilege to these persons and grant it to the persons coming into the District of Columbia temporarily. However, for this Court to distinguish between the two classes, excluding one, and including the other, would result in a rule the future application and interpretation of which would result in more confusion than if no rule at all were expressed.

Counsel for appellant argues that public policy requires the existence of a privilege for members of the military of the United States. Yet nothing is suggested that would indicate that public policy requires

such consideration. On the contrary none exists. In *Merrick et al.* v. *Giddings, supra,* the court said:

> "It is probable, as we think, that the inconvenience which may result to members of Congress in consequence of the construction which we feel ourselves constrained by a sense of duty, to give to this part of the constitution, will be found to occur but rarely and to be rather in the idea than in practice. . . . On the other hand there are reasonable grounds to believe that serious injury might follow from a different construction. . . as well to the public interests, as to those of private citizens.

In *Murrey* v. *Murrey, supra,* the court says:

> "It is hard to believe that the efficiency of the military forces of the United States during a time of peace well be impaired materially by subjecting reserve officers to service of civil process where they may be stationed temporarily."

In *United States* v. *Kirby, supra,* the following appears:

> "The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is for less than that which would arise from extending to them the immunity for which the counsel of the government contends. . . ."

Even Congress has failed to recognize any necessity for such an extraordinary protection to a member of its military: During the last war, Congress in enacting the Soldiers' and Sailors' Civil Relief Act (March 8, 1918, Ch. 20, 40 Stat. 440) considered mere service of process valid and left it to the presiding judge to protect the interest of the soldier or sailor. See Sec-

tion 201. Certainly the repeal of this relief act by Congress indicates clearly the absence of all necessity for any immunity.

IV.

CONCLUSION.

It is respectfully submitted that the defendant below possesses no privilege or immunity from service of process in a civil proceeding merely because of his status as a soldier in the United States Army on detail in the District of Columbia, and the action of the lower court in dismissing the motion to quash service should be affirmed.

Respectfully submitted,

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